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No. 88-1705

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,
Petitioner,

vs.

PARR-RICHMOND TERMINAL COMPANY, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can a chemical company (petitioner) allegedly liable to share response costs under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. sections 9601-9657 ("CERCLA"), for its contamination of real property be subjected to the jurisdiction of the federal court as a potentially jointly liable party in a declaratory relief action initiated by the former owner (respondents) after demands under CERCLA have been made by the current owner against the former owner, so that the liability of the chemical company can be determined together with the liability of others in one and the same litigation?

2. Can a chemical company (petitioner) allegedly jointly liable for response costs be made a third party defendant in a separate action under CERCLA by the current owner against the former owner (respondents) of contaminated property?

3. Is the jurisdiction of the federal court over persons who are potentially liable to share response costs under CERCLA any less in proper declaratory relief actions than in ordinary actions?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Parr-Richmond Terminal Company and John Parr Cox ("Parr-Richmond") respectfully pray the Court to deny the petition for writ of certiorari by Montrose Chemical Corporation of California ("Montrose") and thereby permit this litigation to proceed in the District Court after more than four years of almost total paralysis due to preoccupation with jurisdictional arguments by Montrose upon grounds held on four separate occasions below to be without merit.[1]

OPINIONS BELOW

Petitioner's statement of opinions below relegates to a last sentence reference as a "related opinion" the basic decision of the Ninth Circuit below reversing the original, erroneous opinion of the District Court. That decision of the Ninth Circuit, *Levin*

1. The litigation was commenced in September, 1984. Since Montrose was made a party in March, 1985, the litigation has been almost exclusively consumed by jurisdictional arguments, with a stay of all other proceedings. Montrose's jurisdictional arguments were rejected by decisions of the Ninth Circuit on September 15, 1986, October 28, 1988 and February 17, 1989 as set forth in Petitioner's Appendices C, A-3 and A-1 respectively, and by the decision of the U.S. District Court for the Northern District of California on March 5, 1987 set forth in Petitioner's Appendix B, p. B-7.

Metals Corp. v. *Parr-Richmond Terminal Co.* ("Levin Metals I"), 799 F.2d 1312 (9th Cir. 1986; Petitioner's Appendix C) is denominated as controlling by the later decision of the Ninth Circuit immediately preceding this petition in *Levin Metals Corp.* v. *Parr-Richmond Terminal Co.* ("Levin Metals II"), 860 F.2d 334 (9th Cir. 1988; Petitioner's Appendix A-4).

Petitioner's statement of opinions below omits reference to the original, erroneous order of the United States District Court for the Northern District of California dismissing Parr-Richmond's claims upon the ground that there could not be declaratory relief jurisdiction under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. Sections 9601-9657 ("CERCLA") as amended, for a party plaintiff who has not yet itself incurred response costs. That order, subsequently reversed by the Ninth Circuit, is reported in *Levin Metals Corp.* v. *Parr-Richmond Terminal Co.*, 608 F.Supp. 1272 (D.C. N.Cal. 1985). The relevance of this omitted opinion below is only that the argument of petitioner herein is but an enlarged rehash of that now reversed opinion seeking to create in declaratory relief actions a limitation on federal jurisdiction over persons potentially liable under CERCLA.

STATUTES AND RULES INVOLVED

Rules 13(a), 13(b), 13(h), 19, 20 and 54(b) Federal Rules of Civil Procedure ("F.R.Civ.P.") are involved in this matter as well as Rule 14 F.R.Civ.P. The pertinent portions of the above rules are not reproduced in Petitioner's Appendix and therefore are reproduced herein as Appendix A.

STATEMENT OF THE CASE

A. SUMMARY

Briefly, this case is a claim by a buyer against a seller for contamination of the sold property by the seller's lessees who processed chemicals on it for their chemical company customers over a period of years many years ago. The buyer (Levin Metals

Corporation—"Levin") first made formal demands in writing under CERCLA but then initially filed suit only in the state court under state law, vaguely adumbrating additional CERCLA claims in its state action. The seller (Parr-Richmond) removed to the federal court and filed declaratory relief claims under CERCLA both as counterclaims in the removed state action and in the form of an original declaratory relief action which was consolidated with the removed action. Petitioner Montrose was originally named as a Doe defendant in those declaratory relief actions but was served as soon as its identity as a chemical company customer was determined.

The federal court was and is the only forum in which all claims, both state and federal, could be litigated due to the exclusive federal jurisdiction over CERCLA claims.

Petitioner Montrose first took the position that there could be no jurisdiction for declaratory relief for the seller, Parr-Richmond, because Parr-Richmond had not itself incurred response costs, notwithstanding that threat of lawsuit for response costs had been made against Parr-Richmond by Levin. The District Court at first adopted Montrose's position, but the Ninth Circuit reversed. In its reversal of the District Court's decision the Ninth Circuit explained that there could be jurisdiction in a declaratory relief action where a defendant has incurred response costs and threatened action. Petitioner Montrose has latched on to that explication of the availability of declaratory relief jurisdiction and has attempted to transform that explication into a new narrow restriction on jurisdiction in declaratory relief cases under CERCLA to *only* parties defendant who have incurred response costs and threatened action, omitting all other parties who would normally be included in such litigation as potentially jointly and severally liable parties. In short, Montrose argues that federal jurisdiction over potentially jointly and severally liable parties is *less* in declaratory relief actions under CERCLA than in ordinary CERCLA actions.

Petitioner's interpretation of the law is not only contrary to the Ninth Circuit's opinion and to any rational view of declaratory

relief, but it also ignores the separate additional basis for jurisdiction in the third-party complaint filed by Parr-Richmond in the later action filed by the buyer itself under CERCLA in the federal court after the appeal from the District Court's erroneous first decision (see paragraph C below).

Petitioner Montrose, in its highly selective statement of facts, neglects to state several significant facts pointed out below:

B. THIS LITIGATION ORIGINATED IN A FORMAL CERCLA DEMAND

The origin of this litigation was a written demand by Levin upon respondents Parr-Richmond for response costs under CERCLA, as pointed out by the Ninth Circuit at the outset of its first opinion in this matter (Petitioner's Appendix C at pp. C-3 and C-4). The Ninth Circuit in its later decision deemed the earlier decision to be controlling (see Petitioner's Appendix A-4). The Ninth Circuit held that there was federal jurisdiction over Parr-Richmond's declaratory relief claim under CERCLA, which was stated both as an independent federal action and as a counterclaim in the action by Levin removed from the state court.

C. PLAINTIFF LEVIN ALSO FILED A LATER CERCLA CLAIM IN FEDERAL COURT AND RESPONDENT PARR-RICHMOND FILED A THIRD PARTY COMPLAINT THEREIN AGAINST MONTROSE

Another significant fact, relegated to footnote 4 on page 5 of petitioner's brief, is that while the first appeal was pending, the original plaintiff Levin filed its own CERCLA action in the federal court to litigate the claims in its original CERCLA demand not litigable in the state court (District Court Case No. C-85-4776, Clerk's Record ("CR") at 1, Excerpts of Record ("ER") at 190).[2] Respondent Parr-Richmond filed its third-party complaint for contribution against petitioner Montrose in the Levin

2. Respondents make reference to the Clerk's Records that are included in the Excerpts of Record for the latest appeal. There are three separate clerk's

action (CR 10 in C-85-4776, ER 190) and that third-party complaint was dismissed for lack of jurisdiction by the District Court on the ground that Parr-Richmond had not itself incurred response costs. That dismissal was without prejudice (ER 63) and not appealable (Federal Rules Civil Procedure Rule 54(b); *Baker* v. *Bray*, 701 F.2d 119 (10th Cir. 1983); *Woodby* v. *Chesapeake and Ohio Railway Co.*, 345 F.2d 668 (6th Cir. 1965). The Ninth Circuit was fully advised of all these facts while the first appeal was pending (See respondents' Supplemental Excerpts of Record ("SER") from the latest appeal at pp. 265-266 and 271-272; also see Petitioner's Appendix C at p. C-8, footnote 5). On reversal of its first erroneous decision that there was no federal jurisdiction, the District Court joined and consolidated Levin's later CERCLA action with the earlier declaratory relief action by Parr-Richmond and the declaratory relief counterclaim by Parr-Richmond in the removed state court action. The District Court also permitted the filing of third-party claims against Montrose (CR 138 in C-84-6324, ER 185). These facts are set forth in the order of the District Court from which the latest appeal was taken (see Petitioner's Appendix B at pp. B-8 and B-9). There were therefore three separate claims establishing the jurisdiction of the District Court over Montrose: (1) the declaratory relief action, (2) the declaratory relief counterclaim in the removed state court action, and (3) the third-party complaint against Montrose by Parr-Richmond in the additional Levin action under CERCLA filed while the first appeal was pending.

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records in the consolidated actions and respondents will refer to the case number when making reference to the clerk's record. Case No. C-84-6273 is Parr-Richmond's declaratory relief counterclaim, Case No. C-84-6324 is Parr-Richmond's declaratory relief complaint and C-85-4776 is Levin's later filed CERCLA complaint.

D. PETITIONER HAS PARALYZED ALL LITIGATION PROCEEDINGS FOR OVER FOUR YEARS BY REPETITION OF DISCREDITED JURISDICTIONAL AND PROCEDURAL ARGUMENTS

The tone of petitioner's statement of the case appears designed to create the totally misleading impression of a long suffering Montrose which was "eventually" named as a defendant by Parr-Richmond and that Parr-Richmond "[T]o further complicate matters..." imposed the further indignity upon Montrose of a third-party complaint for contribution after the Levin action was filed in the federal court. The truth is that Montrose has not answered or provided any discovery and has paralyzed proceedings below with prolonged repetition of unmeritorious arguments on jurisdiction.

Montrose was not immediately named as a defendant in respondents' declaratory relief claims because respondents did not then know that Montrose contaminated the property. After learning that fact through discovery from other persons, respondents named Montrose. Within seven months after the filing of the declaratory relief action, that is, in April, 1985, Montrose had been served and had filed its first round of motions for dismissal (CR 59 in C-84-6324, ER 179). The erroneous first decision in the District Court later reversed by the Ninth Circuit in 1986 (Appendix C to Petitioner's Brief) held that there could not be declaratory relief for a party who had not itself incurred response costs under CERCLA but had only been threatened with them. Notwithstanding that reversal in the first opinion of the Ninth Circuit (Petitioner's Appendix C), which Montrose apparently does not now challenge, holding that there is declaratory relief jurisdiction over a party which threatens liability for response costs, and notwithstanding the decision of the District Court to permit the third-party complaint by respondent in Levin's later filed CERCLA action, which in effect rendered moot the question of jurisdiction in the declaratory relief action, Montrose subsequently reiterated before the District Court the truncated position that there cannot also be jurisdiction in a declaratory relief

action over a potentially jointly and severally liable party where such a party has not itself threatened claims for response costs. Montrose persuaded the District Court to certify this question with a stay of all proceedings in the meantime (Petitioner's Appendix B-4 to B-6. Montrose has raised the question of reduced jurisdiction under declaratory relief actions on four occasions[3]).

In brief, Montrose has parlayed its now moot but always untenable position that there is less jurisdiction over CERCLA defendants in declaratory relief cases into a four-year freeze of the litigation below, not only against itself but with respect to all parties.

REASONS FOR NOT GRANTING THE WRIT

A. SUMMARY

Petitioner Montrose is properly a party within the jurisdiction of the District Court under CERCLA according to all applicable law, including the law of CERCLA, declaratory relief and ancillary jurisdiction, as to which there is no pertinent inconsistency in the circuits. Petitioner was properly made a party defendant to the declaratory relief claims as a person potentially liable under 42 U.S.C. Sections 9613(f) and 9607(a) and the Federal Rules of Civil Procedure. Petitioner was also properly made a party defendant in Parr-Richmond's third-party complaint in Levin's later CERCLA action because petitioner is a person potentially liable under Sections 9613(f) and 9607(a). There is no less jurisdiction of the District Court over Montrose in the declaratory relief action than in the third-party complaint.

Petitioner's fundamental but unspoken hypothesis is that somehow the ordinary principles and rules regarding jurisdiction and declaratory relief and the Federal Rules of Civil Procedure concerning additional parties were all repealed by CERCLA due to a

3. The four occasions are: (1) on renewed motion before the District Court after reversal (Petitioner's Appendix B, p. B-7); (2) on certified appeal to the Ninth Circuit; (3) on petition for rehearing and request for rehearing en banc; and (4) on this petition for writ of certiorari.

Congressional intent to limit CERCLA litigation in declaratory relief cases exclusively to parties who have either directly incurred response costs or been threatened with claims against them. Petitioner then tries to justify certiorari by elaborating from this untenable hypothesis a structure of legal interpretations of declaratory relief and ancillary jurisdiction which are simply not applicable to this case. Petitioner also discusses theories of pendent jurisdiction, which is not even an issue in this case.

B. CERCLA DID NOT REPEAL THE JUDICIAL CODE, THE FEDERAL RULES OR THE DECLARATORY JUDGMENT ACT

As petitioner would have it, no one could be a party to declaratory relief CERCLA litigation without having itself incurred response costs or threatened action on them, even though it is clear beyond doubt that other persons potentially jointly and severally liable for contribution could be made parties in ordinary litigation (42 U.S.C. Section 9613(f)). There is absolutely no warrant in CERCLA for petitioner's view. CERCLA provides for the liability of persons, who, like Montrose, have contracted for the treatment of hazardous substances (42 U.S.C. section 9607(a) (3)) so that the question of Montrose's liability arises directly and unambiguously from the statute. Moreover, Congress confirmed this view in 1986 in the Superfund Amendments and Reauthorization Act in section 9613(f) (1) (see petitioner's Appendix D-7) which provides that:

> "[A]ny person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title..." and "[S]uch claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law."

Furthermore, Congress could not reasonably have intended to require the fragmented, piecemeal and protracted successive litigations of CERCLA liability in declaratory relief cases which would necessarily result from petitioner's crabbed interpretation

of the law. Not only is there no justification in the law or cases for petitioner's views but it clearly would make no sense to permit declaratory relief in CERCLA cases, a position which petitioner apparently now accepts, but to require the tortuous route of successive litigations to complete resolution in declaratory relief cases *only*.

Petitioner cites cases to the effect that it is the duty of the Court to examine Congressional intent to determine federal subject matter jurisdiction (at pp. 10-11 of petitioner's brief). No extensive examination is required to determine that a chemical company which has arranged for the treatment of hazardous substances on the subject property is potentially liable for response costs and that federal subject matter jurisdiction exists to determine that liability under the statute and the usually applicable Federal Rules of Civil Procedure in both ordinary and declaratory relief actions.

C. THE NINTH CIRCUIT CORRECTLY HELD THAT DECLARATORY RELIEF WAS APPROPRIATE

Petitioner labors to construct from several cases wholly inapplicable here and from a convoluted misapplication of the well-pleaded complaint rule the conclusion that there was no jurisdiction over Montrose. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, at 691-692 (1950), simply holds that federal subject matter jurisdiction does not exist if it arises only as a defense to a state law claim. That is plainly not the case here, where the claim is exclusively federal and is directly based upon the provision for liability of the petitioner: i.e. a "person who by contract, agreement or otherwise arranged for the disposal or treatment . . . of hazardous substances. . ." 42 U.S.C. 9607(a)(3).

Public Service Commission of Utah v. *Wycoff Co.*, 344 U.S. 237, at 248 (1952), merely reiterates the law recognized by the Ninth Circuit below that it is the character of the threatened action, and not of the defense, which determines declaratory relief jurisdiction. As the Ninth Circuit pointed out below this is

precisely why there was declaratory relief jurisdiction here (Petitioner's Appendix C-6 and C-7).

Franchise Tax Board v. *Construction Laborers' Vacation Trust*, 463 US 1 (1983) held that there was no federal question jurisdiction with regard to a state action for declaratory relief to establish a state right against ERISA funds. The basis of the decision was that the Court could find no congressional intent to permit declaratory relief by a party other than one specifically enumerated in that statute to be entitled to declaratory relief. CERCLA contains no such list of enumerated segregated parties exclusively entitled to declaratory relief. On the contrary the language of CERCLA and of the amendment thereto in sections 9607(a)(3) and 9613(f)(1) (Petitioner's Appendix D-4, D-7) make it plain that relief under the law, including the Declaratory Relief Act, applies to any person liable or potentially liable under section 9607(a) and under the Federal Rules of Civil Procedure and Federal law.

D. PETITIONER'S RELIANCE ON CASES CONCERNING PENDENT JURISDICTION OVER STATE CLAIMS IS TOTALLY AMISS

Petitioner also reaches for help to the totally inapplicable law regarding limitations of pendent jurisdiction over non-federal claims. *Aldinger* v. *Howard*, 427 U.S. 1, at 15-16 (1976), holds that the federal courts will not have jurisdiction over pendent state law claims where no independent federal jurisdiction exists simply because the claim derives from a common nucleus of operative fact. The claim against petitioner here is hardly a state law claim for which there exists no independent basis of federal jurisdiction. The CERCLA statute is the basis of federal jurisdiction and not only is that basis federal but it is exclusively federal. Similarly, *Owen Equipment and Erection Co.* v. *Kroger*, 437 U.S. 365 (1978), is inapposite here because it, too, involved the question of jurisdiction over a claim against a party as to whom there was no independent basis of federal jurisdiction. All of the cases cited in petitioner's brief (at pp. 23-26) under

Aldinger and *Owen* involved the question of pendent jurisdiction over state-law claims where there was no independent basis of federal jurisdiction.[4] The basis of federal jurisdiction in this case is the CERCLA statute.

E. PETITIONER MISREPRESENTS RESPONDENTS' ARGUMENT

At page 21 of its brief, petitioner incorrectly states that Parr-Richmond does not seek to recover response costs from Montrose or seek to shift its liability to Montrose so that the adjudication of Montrose's rights will be a necessary by-product of the adjudication between Parr-Richmond and Levin. This statement is, to put it politely, simply incorrect. Parr-Richmond's claims against Montrose plainly include the claim to recover against Montrose by way of contribution and indemnity (See ER 94ff.).

F. THE DECISION IN LEVIN METALS II IS NOT RIPE FOR REVIEW

The Ninth Circuit's *Levin Metals II* decision is not ripe for review. There is no final judgment. The case is in its initial stages. There is no inconsistency between the decisions of this Court and the court below and the decision below is not in conflict with the decisions of courts in other circuits. Moreover, granting certiorari at this stage will not even be dispositive of the issue of jurisdiction for Parr-Richmond's claims against Montrose inasmuch as Parr-Richmond has made and could renew its third-

4. *Long* v. *District of Columbia*, 820 F.2d 409 (D.C.Cir. 1987); *National Ins. Underwriters* v. *Piper Aircraft Corp.*, 595 F.2d 546 (10th Cir. 1979); *Birmingham Fire Ins. Co.* v. *Winegardner and Hammonds, Inc.*, 714 F.2d 548 (5th Cir. 1983); *Charles D. Bonnano Linen Service, Inc.* v. *McCarthy*, 708 F.2d 1 (1st Cir.), cert. denied, 464 U.S. 936 (1983); *Lovell Mfg.* v. *Export-Import Bank of the United States*, 843 F.2d 725 (3d Cir. 1988); *Bricklayers Fringe Benefit Funds* v. *North Perry Baptist Church*, 590 F.2d 207 (6th Cir.), cert. denied, 444 U.S. 834 (1979); *Haber* v. *County of Nassau*, 557 F.2d 322 (2d Cir. 1977); *Moore* v. *Marketplace Restaurant, Inc.*, 754 F.2d 1336 (7th Cir. 1985); *Roper* v. *Edwards*, 815 F.2d 1474 (11th Cir. 1987); *Steele* v. *Stephan*, 633 F.Supp. 950 (D.Kan. 1986); *Stephenson* v. *Esquivel*, 614 F.Supp. 986 (D.N.M. 1985).

party claims against Montrose in Levin's CERCLA action already on file without reliance on the declaratory relief part of the case. Montrose is therefore subject to the jurisdiction of the court regardless of the outcome of its petition on the declaratory relief question. Certiorari should be denied also because the action is simply one in which a party sought to be held liable for response costs has made claims under CERCLA for determination of its liability and for sharing of such costs by other persons plainly liable under the statute. There is nothing extraordinary about this case except perhaps for the length of delay which petitioner has created in reaching the merits.

CONCLUSION

Respondents Parr-Richmond Terminal Company and John Parr Cox respectfully request that the petition for writ of certiorari be denied.

DATED: May 10, 1989

Respectfully submitted,

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APPENDIX A

FEDERAL RULES OF CIVIL PROCEDURE 13

Counterclaim and Cross-Claim

(a) **Compulsory Counterclaims.** A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

(b) **Permissive Counterclaims.** A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(h) **Joinder of Additional Parties.** Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.

FEDERAL RULES OF CIVIL PROCEDURE 19

Joinder of Persons Needed for Just Adjudication

(a) **Persons to be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence completed relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the

person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party be dismissed from the action.

(b) **Determination by Court Whenever Joinder not Feasible.** If a person described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) **Pleading Reasons for Nonjoinder.** A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) **Exception of Class Actions.** This rule is subject to the provisions of Rule 23.

FEDERAL RULES OF CIVIL PROCEDURE 20

Permissive Joinder of Parties

(a) **Permissive Joinder.** All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transactions or occurrences and if any question of law or fast common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the piaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) **Separate Trials.** The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom the party asserts no claim and who asserts no claim against the party, and may order separate trials or make other orders to prevent delay or prejudice.

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Judgments; Costs

(b) **Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such

determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgement adjudicating all the claims and the rights and liabilities of all the parties.

No. 88-1705

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MONTROSE CHEMICAL CORPORATION OF CALIFORNIA,
Petitioner,

vs.

PARR-RICHMOND TERMINAL COMPANY, *et al.*,
Respondents.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of City of Washington, District of Columbia. I am over the age of 18 years and not a party to the said action. My business address is 2021 L Street, N.W., Washington, D.C., 20036.

On May 10, 1989, I served the within **BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI** on the interested parties in said action by placing three true copies thereof with first-class postage fully prepaid, in the United States post office mailbox at 20th and M Streets, Washington, D.C., in sealed envelopes addressed as follows:

David L. Mulliken, Esq.
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(Attorneys for Parr Industrial Corporation and Fred Cox)

I make this service for ARTHUR R. ALBRECHT, Counsel of Record, THACHER, ALBRECHT & RATCLIFF, Attorneys for Respondents herein, and state that to the best of my knowledge all persons required to be served in said action have been served.

I certify under the penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on May 10, 1989 at 2021 L Street, N.W., Washington, D.C.

/s/ SHEHNAZ A. UNWALLA

SHEHNAZ A. UNWALLA